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No. 99-2030

In The

Supreme Court of the United States

MARK D. GREENBERG, MALCOLM A. SMITH, and HUGO TORBET,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA and THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1999

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioners have requested this Court to grant certiorari to determine whether mandatory classes in the elimination of bias, substance abuse, and emotional distress for members of an integrated bar association violate the First Amendment rights of dissenting members. The question, as petitioners maintained, required a determination whether such subjects were germane to the practice of law and, if so, whether the requirement of classes, as opposed to monetary exactions to support the Bar's own speech and expression, were sufficiently narrow to avoid unnecessary infringement of First Amendment rights. Respondents urge a denial of the writ because, as respondents maintain, existing principles of law clearly and thoroughly resolve the question presented here. In the following, however, petitioners, pursuant to Rule 15.6 of the Rules of the United States Supreme Court, will briefly address selected points in order to show that the law as applied in this context is hardly resolved in any definitive manner, and that a grant of certiorari by this Court is appropriate.

ARGUMENT IN REPLY TO RESPONDENTS' OPPOSITION

A.

THE SIGNIFICANCE OF A FIRST AMENDMENT VIOLATION IS DETERMINED QUALITATIVELY AND NOT QUANTITATIVELY

Respondents maintain that two hours of study in the subjects at issue, spread over the course of three years, and dischargeable by self-study, does not constitute an intrusion substantial enough to implicate the First Amendment at all. (Opp., pp. 5-6.)

In determining the significance of an intrusion on First Amendment rights, it is the quality and not the quantity that controls. (*Elrod v. Burns*, 427 U.S. 347, 373 (1976).) It requires only ten seconds to recite the Pledge of Allegiance, and yet those who wish not to pledge their allegiance in this way cannot, under the First Amendment, be forced to do so. (*Board of Education v. Barnette*, 319 U.S. 624 (1943).) Two hours of indoctrination in subjects clearly related to moral judgment and values is, qualitatively, an imposition within the orbit of the First Amendment. That self-study is possible does not render the imposition any the less within the orbit of the First Amendment since the fundamental concern of First Amendment protection is not merely one's time, but one's *mind:*

> "If the First Amendment means anything, it means that a State has no business telling a man sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the

> thought of giving government the power to control men's minds." (*Stanley v. Georgia*, 394 U.S. 557, 565 (1969).)

In this connection, petitioners have maintained that the required "classes" in question impinge on at least three First Amendment values: privacy (*id.*, p. 564); forum neutrality (*Board of Regents of the University of Wisconsin System v. Southworth*, ___ U.S. ___, 120 S.Ct. 1346, 1350 (2000); and association (*Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 578-580 (1995)). In regard to association, it is worth noting that after the petition for writ of certiorari was filed, this Court issued a decision in *Boy Scouts of America v. Dale*, ___ U.S. ___, 120 S.Ct. 2446 (2000). If, per *Dale*, the Roy Scouts can reasonably maintain that their organizational activities and stated goals are expressive of ethical and moral values protected by the First Amendment, can the State Bar of California reasonably maintain that "classes" in the elimination of invidious biases, substance abuse, and emotional distress are not an expression of ethical and moral values whose compulsory imposition implicates the First Amendment rights of the members of the bar? This and other First Amendment questions surely raise substantial questions that have not been definitively addressed anywhere, including the State Court opinion in this case.

B.

WHETHER THE REQUIRED TOPICS ARE "GERMANE" TO THE PRACTICE OF LAW IS HIGHLY DEBATABLE AND WORTHY OF FURTHER EXAMINATION BY THIS COURT

In regard to whether the required topics are germane to the practice of law, respondents do no more than quote the California Court of Appeal without addressing petitioners' criticism of this holding. (Opp., at pp. 7-11.) Certainly, on the face of things, elimination of bias, substance abuse, and emotional distress are not "germane" in the same sense or same degree that topics such as torts, contracts, constitutional law, etc., are "germane." There is considerable room for discussion about this far beyond the *ipse dixit* of the State Court's opinion. Furthermore, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court did not define "germane", which linguistically, implies a *close* connection, derived as it is from the Latin, *germanus* or *germana*, meaning brother or sister. (Shorter Oxford English Dictionary, First Edition, p. 845, "Germane".) An examination by this Court of the degree of familial resemblance between the practice of law and the required topics will shed important light on this entire area of constitutional law.

C.

FURTHER REVIEW IS REQUIRED TO CLARIFY *KELLER*

Petitioners maintained that even if the required topics were germane, anticipatory classes were not narrowly tailored to avoid unnecessary infringement on First Amendment rights. Petitioners pointed out that the Bar could discipline members who committed malfeasance related to invidious bias, substance abuse, or to emotional distress. Respondents maintain that because *Keller* said nothing about less restrictive alternatives, this concept is not part of the First Amendment analysis in this context. (Opp., at pp. 11-12.)

One should first note that this Court has repeatedly employed an analysis of less restrictive alternatives in a variety of factual contexts involving the First Amendment. (*NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Schad v. Mount Ephraim*, 452 U.S. 61, 69, fn. 7 (1981); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 13-14 (1986); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75-76 (1990); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 215-216 (1997).) If less restrictive alternatives are not mentioned in *Keller* it is worth considering the reason.

Respondents do not give a reason, but petitioners would suggest that in the context of a Bar Association, whose primary contact with most of its members is the exaction of fees, the exaction of fees *is already* the least restrictive form of contact with its members. Thus, where money only is concerned, there is no need to address less restrictive alternatives. By contrast, this case involves not

only the expenditure of money on the required classes, but the expenditure of time and attention, which petitioners believe to be, qualitatively, more intrusive.

Petitioners' point might be better illustrated by reference to this Court's recent decision in *Board of Regents of the University of Wisconsin System v. Southworth, supra,* 120 S.Ct. 1346 (2000). This Court held that the University could use student fees to fund political speech as long as forum-neutrality was maintained. (*Id.*, at p. 1350.) There is, as in *Keller,* no mention of less restrictive alternatives to the exaction of fees. But again, the exaction of fees is already the least restrictive alternative. Would the *Southworth* case be different if the University further required the students to *attend* the political speech they funded? Petitioners believe so. Would an analysis of less restrictive alternatives be called for? Petitioners believe so.

Finally, one might note respondents' claim that petitioners' argument about the least restrictive alternative is hollow. According to respondents, the *prevention* of bias, substance abuse, and emotional distress are germane to the practice of law and protection of the legal consumer, and there is no alternative less restrictive than anticipatory classes in these subjects. While accusing petitioners of missing the point, it is respondents who fail to grasp the matter: the threat of punishment of malefactors is an effective form of *prevention*, which has the further advantage of *not* punishing those who practice law properly and competently, and who value their freedom too much to brook the officious interference of government.

CONCLUSION

The instant case presents several important First Amendment questions in a new, if not unique, context. These questions are *not* answered, or not answered definitively, by established principles of law. For the reasons stated in this brief and in the petition for a writ of certiorari, that petition should be granted.

Dated: July 26, 2000

Respectfully submitted,

MARK D. GREENBERG, *in pro. per., and as attorney for Petitioners Smith and Torbet*